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January 21, 2015

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Ball Bearings and Parts Thereof from the United Kingdom; 2010-2011

Summary

We analyzed the case and rebuttal briefs of interested parties in the administrative review of the antidumping duty (AD) order on ball bearings and parts thereof (ball bearings) from the United Kingdom (U.K.) for the period May 1, 2010, through April 30, 2011. We recommend that you approve the positions we developed in the *Discussion of the Issues* section of this memorandum.

Below is the complete list of the issues in this review for which we received case and rebuttal briefs from parties.

1. Application of an Alternative Comparison Methodology
2. Resumption of the Review
3. Application of Adverse Facts Available
4. Adverse-Facts-Available Rate

Background

On September 23, 2014, the Department of Commerce (the Department) published the preliminary results of the administrative reviews of the AD orders on ball bearings from Japan and the U.K.[1] The period of review (POR) is May 1, 2010, through April 30, 2011. We invited interested parties to comment on the *Preliminary Results.* We received case and rebuttal briefs

[1] *See Ball Bearings and Parts Thereof From Japan and the United Kingdom: Preliminary Results of Antidumping Duty Administrative Review; 2010-2011*, 79 FR 56771 (September 23, 2014) (*Preliminary Results*) and the accompanying memorandum from Associate Deputy Assistant Secretary Gary Taverman to Acting Assistant Secretary Ronald K. Lorentzen entitled, "Decision Memorandum for Preliminary Results of Antidumping Duty Administrative Reviews: Ball Bearings and Parts Thereof from Japan and the United Kingdom; 2010-2011," (Preliminary Decision Memorandum).

from various parties to this review of ball bearings from the U.K.[2] On December 4, 2014, we held a public hearing for this review.[3]

Sales Below Cost in the Home Market

Pursuant to section 773(b)(1) of the Act, the Department disregarded sales in the home market that failed the cost-of-production test for NSK Bearings Europe Ltd. and NSK Europe Ltd. (collectively, NSK) for the final results of this review.

Discussion of the Issues

Comment 1: *Application of an Alternative Comparison Methodology*

The Timken Company (the petitioner) argues that the Department should modify the *Preliminary Results* by applying the alternative average-to-transaction (A-T) method to all of NSK's sales and not just those sales which pass the Cohen's *d* test.

The petitioner argues that the Department's practice should be modified where the percentage of sales that passed the Cohen's *d* test is likely to understate substantially the need for the application of the A-T method. The petitioner contends that, because the Department's Cohen's *d* test does not examine all comparable U.S. sales, strict reliance on the percentage of sales passing the test may well understate the presence of patterns of prices that differ significantly, and, as a consequence, may also understate the need to apply the A-T method to a broader range of U.S. sales, and modifications may be needed to accommodate the circumstances of that situation.

The petitioner asserts that this is the case with respect NSK in this review. The petitioner alleges that, while the statute refers to a pattern of prices for comparable merchandise, the Department has limited the application of the Cohen's *d* test to U.S. sales of identical products only. As a result, according to the petitioner, not all sales could be tested for a pattern of prices that differed significantly among purchasers. Citing *UAE Nails*, the petitioner contends that the Department has indicated that "making price comparisons for identical merchandise may, in some cases, unduly limit the Department's analysis" and that it indicated its intention to proceed on a case-by-case basis, as required.[4]

Second, the petitioner alleges that there is a meaningful difference between the weighted-average dumping margin calculated by the Department and the weighted-average dumping margin that would be calculated by applying the A-T method to all of NSK's U.S. sales. The petitioner contends that the Department should not make adverse assumptions with respect to the sales that have not been examined, or deny the remedy based only on incomplete data.

[2] *See* various parties' case briefs dated October 23, 2014, and rebuttal briefs dated October 28, 2014.
[3] *See* the transcript for the December 4, 2014, hearing filed on December 15, 2014.
[4] *See Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value*, 73 FR 33985 (June 16, 2008) (*UAE Nails*), and the accompanying Issues and Decision Memorandum (I&D Memo) at Comment 4.

NSK Europe Ltd., NSK Bearings Europe Ltd. and NSK Corporation (collectively, NSK) argue that the Department should continue to apply its differential pricing methodology as set forth in numerous other review proceedings and as applied in the *Preliminary Results* of this segment.

First, NSK argues that the Department appropriately excluded certain sales from its analysis of purchaser-based differential pricing. In the context of the differential pricing analysis, NSK asserts, the Department defines "comparable merchandise" as identical merchandise. According to NSK, the petitioner cites no precedent or authority for departing from this practice in the context of the differential pricing analysis. NSK also contends that the petitioner offers no methodology that would allow the Department to evaluate whether variations in such prices would be the result of the physical/technical differences among the products on the one hand or differential pricing behavior on the other. NSK submits that there is no way to make such a determination, which is precisely why the Department's practice has been to limit comparisons to identical products.

Second, NSK argues that the A-T method's impact on the margin calculation is irrelevant. NSK contends that the Department has addressed this argument previously in *Shrimp from Vietnam*, where the facts were similar to the facts in this U.K. review, the petitioners made similar arguments as the petitioner makes here, and the Department rejected the petitioners' approach.[5] NSK concludes that the mere fact that using the A-T method would increase the weighted-average dumping margin is not relevant absent some independent basis for applying it and that the petitioner has provided no such basis.

Department's Position: As an initial matter, the petitioner's arguments do not rely on the language of the statute. The petitioner does not argue that the Department's reliance on the differential pricing analysis violates the statutory language of section 777A(d) of the Act. Rather, the petitioner puts forth arguments unrelated to the statutory language as to why it believes that the Department should modify its approach from the *Preliminary Results*. However, there is nothing in the statute that mandates how the Department measures whether there is a pattern of prices that differ significantly or explains why the A-A method or the transaction-to-transaction method cannot account for such differences. On the contrary, carrying out the purpose of the statute here is a gap-filling exercise by the Department. As explained in the *Preliminary Results* and elsewhere in this memorandum, the Department's differential pricing analysis is reasonable.

We disagree with the petitioner and decline to modify our differential pricing analysis for this proceeding. The statute does not define what we should regard as "comparable merchandise" for purposes of determining whether there is a pattern of prices that differ significantly among purchasers, regions, or time periods.[6] In interpreting this ambiguous statutory provision, in both past targeted dumping analyses and current differential pricing analyses, we rely upon comparing

[5] *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2012-2013*, 79 FR 57047 (September 24, 2014) (*Shrimp from Vietnam*) and the accompanying I&D Memo at Comment 2(C).
[6] *See* section 777A(d)(1)(B) of the Act.

U.S. prices of identical merchandise.[7] We have followed this practice to ensure that: (1) our comparison is made between export sales of merchandise with matching physical characteristics; and (2) the most accurate comparison between U.S. sales - *i.e.*, comparison of sales of identical merchandise - is made.[8] Accordingly, we find this interpretation to be a reasonable interpretation of the controlling statute.

We also disagree with the petitioner's assertion that the results of the Cohen's *d* and ratio tests are based on incomplete information. The Department has based its examination of whether the A-A method is appropriate pursuant to 19 CFR 351.414(c)(1) using all of the data provided by NSK. Appropriately, this is the same data which the Department uses to determine NSK's weighted-average dumping margin. Simply because the petitioner disagrees with the Department's approach and the derived results does not mean that this approach is unreasonable. The standard comparison method, as stated in regulations, is the A-A method. In administrative reviews, like the Department's practice in less-than-fair-value investigations, when the Department finds that the record provides evidence which prompts it to not consider the A-A method to be appropriate, then it may consider the application of an alternative comparison method based on the A-T method. For NSK in this review, the Department has found such evidence which leads it to consider the application of the A-T method to the U.S. sales which pass the Cohen's *d* test and the A-A method to the U.S. sales which do not pass the Cohen's *d* test. As noted above, the Department has established this framework based on its discretion when the statute is silent on a particular matter. To argue that the Department's approach is inadequate simply because it does not reach the petitioner's, or any party's, desired results is without merit.

The Department disagrees with NSK's view that it appropriately excluded certain U.S. sales from its Cohen's *d* test based on purchasers. As noted above in response to a similar comment from the petitioner, the Department has excluded no sales from its analysis; all sales are considered when examining whether there exists a pattern of prices that differ significantly. Simply because there is no basis for making a comparison for certain sales does not mean that the Department has excluded or disregarded sales which has prevented a comparison from being made or that the Department's analysis is based on incomplete information. It simply means that based on the framework which exists for the comparison, that there are no comparable sales available.

Furthermore, the Department disagrees with NSK's contention that the petitioner or the Department make distinctions between the possible causes for the existence of a pattern of prices that differ significantly (*i.e.*, whether the exhibited price differences are the result of physical or

[7] *See, e.g., Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Antidumping Duty Administrative Review and New Shipper Review; 2011-2012*, 78 FR 55676 (September 11, 2013), and the accompanying Preliminary Decision Memorandum at 20 ("For purposes of analyzing sales transactions by purchaser, region and time period, comparable merchandise is considered using the product control number." (footnote omitted)), unchanged in *Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and New Shipper Review; 2011-2012*, 79 FR 19053 (April 7, 2014).

[8] *See also Welded Carbon Steel Standard Pipe and Tube Products from Turkey: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 79665 (December 31, 2013), and the accompanying I&D Memo at Comment 10.

technical differences of the merchandise or the result of different pricing behaviors). The statute makes no such provision when it requires that the Department determine whether there exists a pattern of prices that differ significantly, and the Court of International Trade (CIT) has upheld this understanding.[9]

We also disagree with the petitioner's argument that we should apply the A-T method to all of NSK's U.S. sales because of the meaningful difference in the weighted-average dumping margins calculated when applying the A-T method to the portion of NSK's U.S. sales which pass the Cohen's *d* test and the A-A method to the portion of NSK's U.S. sales which do not pass the Cohen's *d* test, and when applying the A-T method to all of NSK's U.S. sales. As discussed in *Shrimp from Vietnam*, we have set forth a framework for consideration of the A-T method based on the extent of the pattern of prices that differ significantly.[10] As we stated in *Shrimp from Vietnam*, "Simply because there is a difference in the weighted-average dumping margins which are calculated using two different comparison methods does not automatically infer that masked dumping is being revealed … since the implementation of the URAA, the Department consideration of the application of an alternative comparison method must be supported by the facts on the record, including the existence and extent of the identified pattern of prices that differ significantly."[11] This logic applies in this review, as well.

For the foregoing reasons, we have not changed our approach in the differential pricing analysis from the *Preliminary Results* to calculate of NSK's weighted-average dumping margin for these final results of review.

Comment 2: *Resumption of the Review*

Bayerische Motoren Werke AG (BMW) argues that the Department improperly reinstated the administrative review by failing to first publish in the *Federal Register* a notice of opportunity to request an administrative review and follow its statutory and regulatory requirements for initiating a new administrative review. BWM contends that Section 751(a)(1) of the Act provides that the Department is to conduct a periodic review of an AD order only "if a request for such a review has been received."

BMW acknowledges that the Department properly initiated an administrative review for the 2010-11 POR on June 28, 2011, after receiving timely requests to conduct reviews from BMW and other companies. BMW observes that, as a result of litigation following the second sunset review of the AD orders on ball bearings from Japan and the U.K., the Department revoked the AD orders on ball bearings from Japan and the U.K. in 2011. According to BMW, the Department stated in the revocation notice that it was discontinuing all unfinished administrative reviews and would initiate no new administrative reviews of these orders. BMW asserts that the Department provided no indication in its notice that the Department would automatically resume administrative reviews should a "final and conclusive" court decision result in reinstating the orders.

[9] *See Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States*, 990 F. Supp. 2d 1384 (CIT 2014); *JBF RAK LLC v. United States*, 991 F. Supp. 2d 1343 (CIT 2014).
[10] *See Shrimp from Vietnam* and the accompanying I&D Memo at Comment 2(C).
[11] *Id*.

BMW asserts that the CIT has held that the revocation determination of the Department quashes the effect of an AD order. According to BMW, because the Department revoked the orders and discontinued the 2010-11 administrative reviews, the review was terminated. BMW contends that, although an AD order may be reinstated pursuant to court order, when an administrative review is terminated pursuant to a revocation of the order, the Department has no authority to resume automatically the administrative review where it had left off. BMW asserts that the Department provided no legal authority to support its automatic resumption of the administrative reviews that it had previously discontinued. BMW states that it is aware of no cases other than the proceedings relating to these orders in which the Department has automatically reinstated a review following its revocation of an AD order.

Citing *Suntec*, BMW asserts that the CIT has held that a "request for administrative review, and a notice of initiation of such a review, are two distinct processes. {Section 751(a)} states that Commerce will initiate a review, 'if a request for such a review has been received and after publication of notice of such review in the *Federal Register*'…and requires that Commerce ensure both processes are 'lawfully' completed prior to commencing a review."[12] BMW claims that the Department's publication of a notice of reinstatement following the revocation of the orders and termination of the reviews failed to ensure that both administrative procedures were "lawfully" completed prior to commencing its review. As a result, BMW contends, the Department provided insufficient notice to BMW and the other companies subject to its *Preliminary Results*. BMW concludes that, because the Department failed to initiate and conduct the antidumping review appropriately, the rates assigned in the *Preliminary Results* are improper, and the administrative review is a nullity and should be rescinded.

The petitioner argues that the Department should reject BMW's argument. According to the petitioner, section 751(a)(1) requires that the Department conduct an annual review if a request for such a review has been received, requires that the Department determine the amount of any antidumping duty, and publish the results of its review. The petitioner contends that the requests for an annual review were received (and not withdrawn) from BMW and from other parties and, thus, the review was lawfully initiated. That being the case, the petitioner avers, when the order was reinstated, the statute required that Commerce complete the previously initiated administrative review.

The petitioner argues that *Suntec* offers no support for BMW's position that the reinstatement notice was ineffective without renewed review requests. According to the petitioner, the domestic industry interested party in the administrative review underlying *Suntec* requested an administrative review of Suntec and numerous other companies but the domestic industry's request was not served on Suntec. The petitioner asserts that the Court held that Commerce's regulations require that the party requesting a review serve a copy of the request on each exporter or producer specified in the request and that, while the regulation permitted the Department to proceed with a review without service of the request, the agency could do so only if it was satisfied that a reasonable effort was made to serve a copy of the request. The petitioner contends that this holding has no application whatsoever here as BMW cannot claim that it had

[12] *See Suntec Indus. Co. v. United States*, 951 F. Supp. 2d 1341, 1348 (CIT 2013) (*Suntec*).

no notice, because the review of BMW was lawfully initiated on the basis of BMW's own request.

The petitioner further argues that the Department should reject BMW's argument that the Department did not provide any indication that it would automatically resume administrative reviews should a final and conclusive court decision result in reinstating the orders. The petitioner asserts that the resumption was not automatic but, rather, was announced in the Department's reinstatement notice. The petitioner also claims that the revocation notice indicated only that the Department was discontinuing the review and that there was no language in the revocation notice suggesting that the review would not be resumed if the order were reinstated in accordance with the final conclusion of the litigation.

Department's Position: We disagree with BMW and determine that we followed our statutory and regulatory obligations when conducting the administrative review. On May 2, 2011, the Department published its *Opportunity Notice* in the *Federal Register*.[13] BMW then requested its own review and the Department initiated an administrative review of BMW in June 2011.[14]

Meanwhile, litigation stemming from the International Trade Commission's (ITC) determination in the second sunset review of the AD orders was being pursued by other parties at the CIT.[15] In its third and fourth remand determinations before the CIT, the ITC found that revocation of the AD orders on ball bearings from Japan and the U.K. would not be likely to lead to the continuation or recurrence of material injury in the United States within the reasonably foreseeable time.[16] The CIT affirmed the fourth remand and entered judgment on April 20, 2011.[17] The CIT issued a temporary stay of the effect of its judgment, which it lifted on May 13, 2011.[18] On May 17, 2011 the Court of Appeals for the Federal Circuit (Federal Circuit) issued its own temporary stay, which it lifted on July 6, 2011.[19]

Effective July 16, 2011,[20] we revoked the AD orders on ball bearings from Japan and the U.K., pursuant to the CIT's decision in *NSK*, section 751(d) of the Act and the Federal Circuit's

[13] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 76 FR 24460 (May 2, 2011) (*Opportunity Notice*).
[14] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 76 FR 37781 (June 28, 2011).
[15] *See NSK Corp. v. United States International Trade Commission*, Court No. 06-334 (CIT).
[16] *See* ITC Publication 4194, *Ball Bearings and Parts Thereof From Japan and the United Kingdom, Investigation Nos. 731-TA-394A and 399A (Second Review) (Third Remand)* (August 2010); ITC Publication 4223, *Certain Ball Bearings and Parts Thereof From Japan and the United Kingdom, Investigation Nos. 394-A and 399-A (Second Review) (Fourth Remand)* (March 2011).
[17] *See NSK* v. *United States*, 774 F. Supp. 2d 1296 (CIT 2011) (*NSK*).
[18] *See Ball Bearings and Parts Thereof From Japan and the United Kingdom: Notice of Court Decision Not in Harmony With Continuation of Antidumping Duty Orders*, 76 FR 35401 (June 17, 2011).
[19] *See Ball Bearings and Parts Thereof From Japan and the United Kingdom: Revocation of Antidumping Duty Orders*, 76 FR 41761 (July 15, 2011) (*Revocation Notice*).
[20] The effective date was set to 10 days after the final stay had been lifted.

decision in *Diamond Sawblades*.[21] At the same time, as a result of the revocations, we also discontinued all unfinished administrative reviews of the orders.

In May 2013, the Federal Circuit reversed the CIT's decision and ordered the CIT to reinstate the ITC's prior affirmative injury determinations.[22] On November 18, 2013, the CIT reinstated the ITC's affirmative determinations and, as a result, in December 2013, we reinstated the AD orders and resumed the administrative reviews that had been discontinued as a result of the litigation.[23]

BMW argues that we had to publish a notice of opportunity to request an administrative review again after reinstating the antidumping duty orders. We disagree. We published the notice of opportunity to request an administrative review on May 2, 2011.[24] After the publication of the *Opportunity Notice*, BMW filed its review request on May 18, 2011.[25]

Additionally, what BMW is arguing could be onerous for the Department and respondent companies. Although the 2010-2011 administrative review had been recently initiated when the orders were revoked and the reviews discontinued, at that time the 2009-2010 administrative review had also been underway and the Department already had published the preliminary results of that review.[26] Following, for illustrative purposes only, BMW's argument using the 2009-2010 administrative review as an example might have the Department publish another notice to request administrative review and notice of initiation; reselect respondent companies; reissue our AD questionnaires and supplemental questionnaires; collect, analyze, and verify data; and publish another preliminary results of review. This would be onerous on both the Department and the respondent companies and is not directed by the statute or regulations.

BMW also argues that we have no authority to resume automatically a "terminated" administrative review. However, the administrative review was not terminated. We discontinued all unfinished administrative reviews as a result of the revocations.[27] The use of the term "discontinued" does not indicate that the review would not be resumed if the order were reinstated. We also continued to suspend liquidation on entries of ball bearings so that entries may be liquidated in accordance with a "conclusive" court decision.[28] With the order reinstated following a court decision, the Department properly resumed its review. Consistent with our

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[21] *See Revocation Notice*; *see also Diamond Sawblades Manufacturers Coalition v. United States*, 626 F.3d 1374 (Fed. Cir. 2010) (*Diamond Sawblades*) (requiring Commerce to publish antidumping duty orders upon notice of a final affirmative injury determination on remand).
[22] *NSK Corp* v. *United States International Trade Commission*, 716 F.3d 1352 (Fed. Cir. 2013).
[23] *See Ball Bearings and Parts Thereof From Japan and the United Kingdom: Notice of Reinstatement of Antidumping Duty Orders, Resumption of Administrative Reviews, and Advance Notification of Sunset Reviews*, 78 FR 76104 (Dec. 16, 2013) (*Reinstatement Notice*).
[24] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 76 FR 24460 (May 2, 2011) (*Opportunity Notice*).
[25] *See* BMW's review request dated May 18, 2011.
[26] *See Reinstatement Notice*, 78 FR at 76105 (citing *See Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Preliminary Results of Antidumping Administrative and Changed-Circumstances Reviews*, 76 FR 22372 (April 21, 2011)).
[27] *See Revocation Notice*, 76 FR at 41763.
[28] *Id.*

statute, we have reviewed and determined the amount of any antidumping duties on POR entries of subject merchandise from the companies subject to review.[29]

BMW also asserts that it was not aware of any other cases in which we have automatically reinstated a review. BMW is correct. This is the first case, after the *Diamond Sawblades* decision, where we had to revoke an AD order following a CIT decision, and then subsequently reinstate that order after the Federal Circuit reversed the decision by the CIT. Nevertheless, the imposition and revocation or an order was contemplated in the *Diamond Sawblades* decision.[30] As a result of the reinstatement, we resumed this review.

Finally, BMW argues that we failed to provide sufficient notice that it would be subject to a preliminary results of an administrative review. However, we published a *Federal Register* notice that detailed the next steps in the administrative review when we reinstated the AD orders.[31] We stated that we intended to issue our preliminary results no later than 245 days after the publication of the *Federal Register* notice and that parties could withdraw their request for review for 90 days after the date of publication of the reinstatement notice.[32] This information was also available on the Department's electronic filing and record service. In fact, 31 parties did withdraw their request for review in the concurrent review of ball bearings from Japan.[33] BMW chose not to withdraw its request for an administrative review and, thus, remained subject to the review.

Comment 3: *Application of Adverse Facts Available*

BMW argues that the Department improperly assigned BMW a rate based on adverse facts available (AFA). BMW claims that its failure to provide the Department with a response to its quantity and value (Q&V) questionnaire was not the result of its conscious failure or refusal to cooperate, but was due to the unfortunate and inadvertent oversight of counsel resulting from the substantial delay between the Department's initiation of the administrative review in 2011 and its reinstatement.

BMW asserts that the attorney responsible for filing and monitoring the administrative review request in 2011 had left the law firm representing BMW. According to BMW, although it concedes that the Department sent an e-mail to 16 attorneys, including counsel for BMW, advising that the Department was sending out a Q&V questionnaire in this review, the attorney now representing it at the law firm does not recall ever seeing that e-mail. BMW also avers that, even if counsel had seen it, it would not have necessarily alerted him to the need to file a Q&V response for BMW because no respondent's name appeared in the e-mail text.

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[29] *See* section 751(a)(1)(B) of the Act. If a request for review has been received, the Department must review and determine the amount of any antidumping duties. Here, BMW itself requested a review.

[30] *See Diamond Sawblades*, 626 F.3d at 1380 n.3 ("Because the antidumping duty order can simply be altered or revoked and the cash deposits returned if the judicial challenge is successful in whole or in part, the issuance of an antidumping duty order and the collection of cash deposits do not present the risks associated with a constantly changing set of rules applicable to subject imports....").

[31] *See Reinstatement Notice*, 78 FR 76104.

[32] *Id.*, at 76105.

[33] *See Ball Bearings and Parts Thereof From Japan: Rescission of Antidumping Duty Administrative Review, in Part; 2010-2011*, 79 FR 26405 (May 8, 2014).

BMW contends that, had counsel for BMW been aware that BMW was a party to this administrative review, it would have responded to the Department's Q&V questionnaire. BMW asserts that its failure to respond to the Q&V questionnaire did not result from its conscious failure to cooperate with the Department's processes or any attempt to obtain some undue advantage.

BMW also argues that it would not have been without precedent given the very unusual circumstances of this situation for the Department to have followed up with counsel for BMW when it was discovered that BMW's Q&V response had not been filed. BMW contends that this would have provided counsel with an opportunity to attempt to cure its failure to file, or even to withdraw the review request if sufficient time to do so remained. BMW claims that, in at least one other case, the Department assigned a rate based on AFA to companies who failed to timely submit Q&V submissions, but only after the Department first sent the questionnaire *via* Federal Express, confirmed that the companies signed for and received the Federal Express packages, and also sent the Q&V questionnaire *via* facsimile machine. In contrast, BMW contends, in this case, the Q&V questionnaire was transmitted *via* a mass e-mail to multiple attorneys. BMW argues that, given that two and one-half years had passed between the Department's initiation notice and its notice of reinstatement, it might have been appropriate for the Department to telephone undersigned counsel directly to confirm receipt of the Q&V questionnaire on behalf of BMW, especially when BMW failed to file a response in January 2014.

Citing *Lined Paper from India*, BMW asserts that the Department has previously determined that it would not apply AFA in cases where there were issues relating to service of the Q&V questionnaires.[34] In that case, according to BMW, the Department found that two companies did not receive Q&V questionnaires until after the initial due date and that it was, therefore, appropriate to apply the rate for non-selected cooperative respondents to these companies. BMW also cites *Ball Bearings 2011*, where the Department determined that application of AFA was not warranted for a respondent when the Department overlooked its Q&V submission.[35]

BMW argues that, due to the multiplicity of factors described above, as in *Lined Paper from India*, the Department should consider applying the rate for non-examined, cooperative respondents to BMW. BMW contends that, even if the Department is unwilling to use the non-examined rate for BMW, the Department's AFA determination is unsupported and it should base the rate assigned on simple facts available. BMW asserts that the Department made no specific finding regarding how BMW failed to cooperate to the best of its ability in the *Preliminary Results*. Citing *Ferro Union*, BMW alleges that the CIT has held that "{s}ignificantly impeding the review" is only sufficient grounds to warrant an application of facts available (but not AFA) and that "{a} respondent could impede a review without intending to do so, for example, because it did not understand the questions asked. The statute requires an additional finding under section 1677e(b) that a respondent could have complied, and failed to do so."[36] Similarly, in this

[34] *See Certain Lined Paper Products From India: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 22232 (April 15, 2013) (*Lined Paper from India*).
[35] *See Ball Bearings and Parts Thereof From France, Germany, and Italy: Final Results of Antidumping Administrative and Changed Circumstances Reviews*, 76 FR 52937 (August 24, 2011) (*Ball Bearings 2011*).
[36] *See Ferro Union, Inc. v. United States*, 23 CIT 178, 199 (CIT 1999) (*Ferro Union*).

case, BMW avers, neither it nor its counsel manifested any intent to impede the review, because they were not even aware of their failure to respond to the Department's request until publication of the Department's *Preliminary Results*.

BMW also claims that its failure to provide a Q&V response did not impede the Department's review in any way. BMW contends that the CIT explained in *Ferro Union* that "if overall the failure . . . was of no significance to the progress of the investigation, then Commerce cannot apply total adverse facts." BMW claims that it is of special significance that the petitioner did not even request an administrative review of BMW; only BMW requested an administrative review of BMW. BMW argues that its unwitting failure to participate did not prejudice any other parties or impede the proceedings in any way. BMW claims that, even if it had filed a Q&V response, it is likely it would not have been selected as a mandatory respondent. According to BMW, the Department has provided no explanation for how BMW's failure was of significance to the conduct of the review. BMW asserts that, because its failure to file a Q&V response had no adverse impact on the review—the only adverse impact was on BMW itself—the Department's application of AFA was improper. BMW contends that, even if the Department still felt that a facts available rate was warranted, it could and should have applied to BMW nothing more than the U.K. all others rate of 54.27 percent, in effect denying BMW the benefit of an administrative review.

BMW further argues that the CIT's analysis in *Artisan* is also relevant to the facts of this case.[37] According to BMW, the CIT in *Artisan* considered the Department's rejection of an untimely filed Q&V and found in that case that, considering the record as a whole, Commerce abused its discretion in assigning the respondent an AFA rate based on its failure to file a timely Q&V response. BMW asserts that, as in *Artisan*, BMW's failure to file a Q&V response was based on an inadvertent omission made by its counsel and that the Department has made no findings to the contrary. BMW also argues that the CIT has held that a mere failure to respond to the Department's request is not sufficient to warrant a finding of AFA.

The petitioner argues that the Department should reject BMW's argument. The petitioner asserts that the considerations underlying *Lined Paper from India* and *Ball Bearings 2011* are not applicable here.

Department's Position: We disagree with BMW. We preliminarily found that BMW did not cooperate.[38] We have not changed that finding. We do not agree with BWM's distinction between itself and its counsel for our analysis of whether it has acted to the best of its ability in responding to our requests for information.[39] Thus, it does not matter whether the failure to respond was due to BMW's personnel or the counsel hired by BMW to represent it before the Department. Indeed, if we were to make such a differentiation, any respondent with counsel could attempt to evade our requests for information by claiming fault on the part of its counsel.

[37] *See Artisan Manufacturing Corp. v. United States*, 978 F. Supp. 2d 1334 (CIT 2014) (*Artisan*).
[38] *See Preliminary Results.*
[39] *See, e.g., Certain Oil Country Tubular Goods From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 52301 (September 3, 2014) (*OCTG from PRC*), and accompanying Issues and Decision Memorandum at Comment 3.

Moreover, we are under no obligation to "follow up" with further e-mails or telephone calls when a party fails entirely to respond to a request for information.[40] In this instance, we sent an e-mail to the counsel for each of the respondents subject to this review.[41] We attached the Q&V questionnaire to this e-mail.[42] Every other respondent in this review responded to the Q&V questionnaire.[43] In addition, counsel for BMW represents other clients in other proceedings, and has used the same e-mail address as is in the Proof of Delivery Letter.[44] Moreover, although BMW's counsel represents that it "does not recall ever seeing that e-mail," BMW does not represent that the e-mail address to which we sent the e-mail was incorrect; rather, BMW represents that "staff responsible for receiving and retrieving electronic filings on IAACCESS inadvertently misfiled all electronic filings in this proceeding."[45] Accordingly, we had no reason to believe or suspect that the e-mail was not delivered.

BMW argues that its failure to participate did not prejudice other parties or impede the proceedings in any way. Because BMW did not respond to our request for information, however, we have no way to know this. We selected a respondent for individual examination based on largest volume by exports, consistent with section 777A(c)(2)(B) of the Act. We only had the resources to select one respondent[46] and BMW did not submit its Q&V questionnaire response to inform the Department of its quantity and value of exports of subject merchandise during the POR. Thus, without knowing BMW's quantity and volume, we cannot know whether we would have selected BMW as a mandatory respondent in this review. While BMW also argues that it is likely it would not have been selected as a mandatory respondent had it responded to our Q&V questionnaire, this is simply speculation and, without BMW's quantity and value information having been submitted on the record, we have no way of knowing whether this would have been the case.

Moreover, the facts of the cases cited by BMW do not support BMW's argument. First, *Lined Paper from India* dealt with a respondent who, according to evidence on the record of that review, did not receive the Q&V questionnaire until after the deadline for submitting a

[40] However, when a non-responsive party to which we preliminarily assigned an AFA rate submitted evidence that it did not receive our request for information (*e.g.*, proof of delivery showing that our questionnaire was delivered to an incorrect address) and we agreed with the party's claim, we did not continue to assign the AFA rate for the final results. *See Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part*, 71 FR 65082 (November 7, 2006) (*Reinforcing Bars from Turkey*), and the accompanying I&D Memo at Comment 22.

[41] *See* letter to file, "Ball Bearings and Parts Thereof from the United Kingdom – Delivery of the Quantity-and-Value Questionnaire" (September 17, 2014) (Proof of Delivery Letter).

[42] *Id*.

[43] *See* letter from Caterpillar Inc., Caterpillar Paving Products Inc. and Caterpillar affiliates, dated January 6, 2014, letter from NSK Europe Ltd., NSK Bearings Europe Ltd., and NSK Corporation, dated January 6, 2014, and letter from Robert Bosch LLC, and its affiliated foreign exporters and U.S. importers of subject merchandise, dated January 6, 2014.

[44] For example, compare the email address in the Proof of Delivery Letter to the email address for counsel for Schaeffler KG in the public service list for ball bearings and parts thereof from Germany for the 2009-10 review (http://web.ita.doc.gov/ia/webapotrack.nsf/26f3835426434a4b852569df00718b6f/6c14e31a0b619cdf852578f70050845c?OpenDocument).

[45] *See* letter from BMW, "BMW's Direct Case Brief: Antidumping Duty Administrative Review on Ball Bearings and Parts Thereof From The United Kingdom (POR 5/1/10 - 4/30/11)" (October 23, 2014) at 6-7.

[46] *See* memorandum to Thomas Gilgunn, "Antidumping Duty Administrative Review of Ball Bearings and Parts Thereof from the United Kingdom for the 2010-11 Review Period – Selection of Respondents" (April 1, 2014).

response.[47] This is not the situation for BMW in this review. There is no evidence on the record of this review that the Q&V questionnaire was not delivered. To the contrary, in its case brief, BMW claims that "all documentation received for this proceeding beginning in December, 2013 was misfiled in the files maintained for" another party represented by counsel for BMW.[48] Accordingly, *Lined Paper from India* is inapposite to this review. Second, *Ball Bearings 2011* dealt with a respondent who actually responded to the Department's Q&V questionnaire but whose response was inadvertently not recognized by the Department.[49] Accordingly, *Ball Bearings 2011* is inapposite to this review. Finally, *Artisan* dealt with two respondents who filed the Q&V responses "at or near the beginning of the next business day" after the deadline.[50] BMW did not submit a response at all in this review. Accordingly, *Artisan* is inapposite to this review. For the foregoing reasons, we continue to find that BMW did not respond to the best of its ability and that an adverse inference is warranted in applying facts available to establish the weighted-average dumping margin for BMW.

In addition, our approach in this review is consistent with other proceedings where we have dealt with similar issues.[51]

Finally, a party's failure to cooperate need not be intentional. While intentional conduct, such as deliberate concealment or inaccurate reporting, may demonstrate a failure to cooperate, the statute does not contain an intent element.

Comment 4: *Adverse-Facts-Available Rate*

BMW argues that the AFA rate assigned to BMW was excessive and unreasonable. BMW contends that, even if the Department was correct that an AFA rate was warranted, the rate which the Department assigned is so excessive that the Department has attached a consequence to BMW's failure that is grossly disproportionate to the mistake that was made. BMW asserts that the courts have held that the purpose of AFA is not to impose a punitive, aberrational, or uncorroborated weighted-average dumping margin, but to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance. Citing *Am. Silicon Techs*, BMW argues that the CIT found that the 93.20 percent AFA rate was "so far removed from being 'a reasonably accurate estimate of the respondent's actual rate' that it is disproportionately punitive in nature" and that, although, in corroborating the rate assigned, "Commerce is technically correct in stating that antidumping rates have fluctuated from zero to 81.61 percent," the rate assigned was unreasonable, particularly given that "the period of review in question began six years after the LTFV investigation in which the 93.20 percent margin was calculated."[52]

[47] *See Lined Paper from India* and the accompanying I&D Memo at Comment 4.
[48] *See* letter from BMW, "BMW's Direct Case Brief: Antidumping Duty Administrative Review on Ball Bearings and Parts Thereof From The United Kingdom (POR 5/1/10 - 4/30/11)" (October 23, 2014) at 6.
[49] *See Ball Bearings 2011* and the accompanying I&D Memo at Comment 3.
[50] *See Artisan*, 978 F. Supp. 2d at 1338.
[51] *See, e.g., Certain Oil Country Tubular Goods From the People's Republic of China: Final Results of Countervailing Duty Administrative Review; 2012*, 79 FR 52301 (September 3, 2014), and accompanying Issues and Decision Memorandum at Comment 14.
[52] *See Am. Silicon Techs. v. United States*, 240 F. Supp. 2d 1306 (CIT 2002) (*Am. Silicon Techs*).

BMW argues that the AFA rate used by the Department in this case was the highest rate alleged in the petition, which was filed with the Department in 1988, over 25 years ago. BMW asserts that there is no evidence to support the Department's claim that the AFA rate from the petition falls within the range of individual dumping margins which were calculated for NSK in the instant review period. BMW contends that, even if the Department wished to assign a rate to BMW that was sufficiently adverse to ensure that BMW did not obtain a more favorable result by failing to cooperate, a rate 160 times higher than every other rate assigned in the review period, based on a petition filed more than 25 years ago, can only be described as punitive, aberrational, and uncorroborated.

Citing *Gallant Ocean*, BMW claims that the Federal Circuit found that a petition rate selected as AFA by the Department "does not represent commercial reality" because it was "more than ten times higher than the average dumping margin for cooperating respondents" and that "Commerce did not identify any relationship between the small number of unusually high dumping transactions with Gallant's actual rate, those transactions cannot corroborate the adjusted petition rate."[53] BMW contends that the aberrationally high petition rate assigned to BMW allegedly corroborated with a very small percentage of the mandatory respondent's transactions even though most transactions during the period of review had significantly lower dumping margins, demonstrates that it has no basis in commercial reality, even allowing for some built-in addition to deter parties from non-compliance. BMW concludes that the Department has failed to identify any relationship between the transactions used to corroborate the petition rate and the rate assigned to BMW.

The petitioner states that it takes no position with regard to BMW's argument that the Department should apply the all others rate (54.27 percent) instead of the petition rate (254.25 percent).

Department's Position: We disagree with BMW and we have continued to assign the AFA rate of 254.25 percent to BMW for the final results. As we stated in the Preliminary Decision Memorandum,[54] when a respondent fails to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act authorizes us to rely on secondary information derived from the petition, a final determination, a previous administrative review, or other information placed on the record.[55] It is the Department's normal practice in an administrative review to select as AFA the highest rate on the record of the proceeding that can be corroborated, to the extent practicable, if the rate is secondary information.[56] As explained in

[53] *See Gallant Ocean (Thail.) Co. v. United States*, 602 F.3d 1319 (Fed. Cir. 2010) (*Gallant Ocean*).
[54] *See* Preliminary Decision Memorandum at 7.
[55] *See* 19 CFR 351.308(c)(1) and (2); *see also* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol.1 (1994) at 868-870 (SAA).
[56] *See Certain Large Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Over 41/2 Inches) From Japan: Preliminary Results of the Antidumping Duty Administrative Review*; 2012-2013, 79 FR 42762 (July 23, 2014), unchanged in *Certain Large Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Over 41/2 Inches) From Japan: Final Results of the Antidumping Duty Administrative Review*; 2012-2013, 79 FR 68408 (November 17, 2014) ("The Department's practice, when selecting an AFA rate from among the possible sources of information, has been to select the highest rate on the record of the proceeding…"). In prior reviews of the antidumping duty orders on ball bearings from various countries, we have generally used the highest rates calculated in prior segments of the proceeding which we could corroborate as adverse facts available. *See, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Preliminary Results of*

the preliminary results, the 254.25 percent rate represents the highest rate calculated in the petition with respect to ball bearings from the U.K. that could be corroborated to the extent practicable.[57]

Section 776(c) of the Act specifies that, when we rely on secondary information, the Department shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. To "corroborate" means that the Department is satisfied that the secondary information to be used has probative value.[58] In this review, when we examined the highest petition rate, 254.25 percent, to determine whether it could be corroborated to the extent practicable. We examined data on the record of this review and found that this rate "falls within the range of individual dumping margins which we calculated for NSK in the instant administrative review concerning ball bearings from the U.K."[59] The practice of comparing the rate to the range of individual dumping margins calculated for the mandatory respondents has been upheld by the court. [60] Given that a cooperative respondent, NSK, had transaction-specific dumping margins in excess of 254.25 percent, we determine that the petition margin is a reasonable rate incorporating an adverse inference for a company that did not respond to our request for information.

Further, we consider information reasonably at our disposal as to whether there are circumstances that would render a rate based on AFA as inappropriate. Where circumstances indicate that the selected rate is not appropriate as AFA, we may disregard the rate and determine an appropriate AFA rate.[61] In this review, while BMW has asserted that the petition margin is aberrational, BMW has cited to no evidence on the record of this review to indicate what there is about NSK's sales that exceeded 254.25 percent that was unusual, much less aberrational. Moreover, we have never reviewed BMW. As a result, there is no basis for the assertion that the rate we assigned is "punitive" or "aberrational" with respect to BMW or not reflective of BMW's "commercial reality."

Antidumping Duty Administrative Reviews and Intent to Rescind Reviews in Part, 73 FR 25654,25657-8 (May 7, 2008) (unchanged in final; 73 FR 52823, September 11, 2008). However, in this review, we are not using calculated rates from prior segments of this proceeding as adverse facts available because all calculated rates in prior segments of these proceedings either involved the use of zeroing or were zero. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012).

[57] *See* Preliminary Decision Memorandum at 7.

[58] *See* Preliminary Decision Memorandum at 8.

[59] *See* Preliminary Decision Memorandum at 8.

[60] *See Hubscher Ribbon Corp., Ltd. v. United States*, 942 F. Supp. 2d 1375 (CIT 2013) (*Hubscher*).

[61] *See, e.g., Fresh Cut Flowers from Mexico; Final Results of Antidumping Duty Administrative Review*, 61 FR 6812, 6814 (February 22, 1996) (where the Department disregarded the highest calculated margin as AFA because the margin was based on a company's uncharacteristic business expense resulting in an unusually high margin).

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of the reviews and the final weighted-average dumping margins for all of the reviewed firms in the *Federal Register*.

Agree ✓ Disagree _____

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

21 August 2015
Date